IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

NOTICE OF MOTION NO.3197 OF 2007
IN
SUIT NO.2746 OF 2005

Shaligram Shankar Bendale ..Plaintiff.
Vs.
Jolly Brothers Pvt. Ltd. and others ..Defendants.

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Mr. Laxman N. Bedekar i/b M/s. S. Ashwinikumar & Co. for the Plaintiff.
Mr. Ravi Kadam, Advocate General with Mr. V.P. Sawant and Mr. Jai Bhatia for Defendant Nos. 1 and 2.
Mr. Kapil Moye with Ms. Vibhuti Vyas i/b Mr. Prashant Ghelani for Defendant No.3.
Mr. Shyam Upadhyay for the Intervenor.

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CORAM: **DR. D.Y. CHANDRACHUD, J.**

3rd December, 2007.

P.C. :

1. This Notice of Motion has been taken out by the First and Second Defendants for recalling an order passed on 20th June, 2007 in Notice of Motion 3078 of 2005 and for allowing a statement made on behalf of the advocate for the Second and Third Defendants as recorded in the order of the Court to be withdrawn. The Plaintiff has instituted a suit out of which these proceedings arise on 13th September, 2005 for specific performance of an

agreement dated 11th March, 1997 entered into with the First Defendant. The Plaint contains a statement that on 10th February, 2005 an agreement was entered into between the First and Third Defendants. Prayer clause (b) of the Plaint is for a declaration that the agreement between the First and Third Defendants dated 10th February, 2005 is not valid and would not bind the Plaintiff. An application for ad interim relief was made before a Learned Single Judge of this Court. The ad interim relief was refused on 19th October, 2005. The Notice of Motion came up for hearing and final disposal on 20th June, 2007 when the following order was passed :

> "The learned Counsel appearing for defendant nos.1 and 2 states that without seeking leave of the Court, the defendant nos.1 and 2 shall not create any third party interest, alienate or transfer the suit property. The statement is accepted. In view of this statement, in my opinion, rights of the plaintiff are protected. No further orders are necessary. Notice of Motion is disposed of."

The Notice of Motion before the Court is for recalling the aforesaid order and for relieving the First and Second Defendants of the statement made.

2. In the affidavit in support of the Notice of Motion, the following averment has been made :

> "I say that when the matter reached hearing on 20th June,

> 2007, the junior Advocate Mr. Makrand Narvekar who was instructed to appear and seek an adjournment appeared and sought time from this Hon'ble Court. This Hon'ble Court was however not inclined to grant an adjournment. Thereafter, the Advocate on a query being made from this Hon'ble Court, expressed his willingness to make a statement that Defendant Nos.1 and 2 shall not create any third party right, title and interest in the suit property without seeking leave of this Hon'ble Court. This Hon'ble Court accordingly recorded the statement of the Advocate and disposed of the Notice of Motion. I say that the Advocate had no instructions whatsoever to make a statement such as this. In fact, the record itself establishes that Defendant Nos.1 and 2 have already created right, title and interest in favour of Defendant No.3. In fact, the plaint itself challenges the agreement dated 10th February, 2005 entered into between Defendant No.1 and Defendant No.3. Furthermore, after the filing of the suit, the right, title and interest of Defendant Nos.1 and 2 in the suit property in fact stands conveyed to Defendant No.3. Thus, Defendant Nos.1 and 2 had already created rights in favour of Defendant No.3 and such a statement as recorded apart from being without any instructions was also completely incorrect."

3. No reply has been filed to the Notice of Motion. On 29th November, 2007 when the Motion came up for ad interim relief, parties agreed to the final disposal of the Motion at the bottom of the ad interim board on 3rd December, 2007. Accordingly the following order was passed :

> "By consent, the Notice of Motion is directed to be listed for hearing and final disposal at the bottom of the ad-interim board on 3rd December, 2007."

The Notice of Motion has accordingly been placed on Board. No reply has been filed. At the present stage, from a perusal of the averments contained in the Plaint, it would appear that the Plaintiff has averred that an agreement was entered into between the First Defendant and the Third Defendant on 10th February, 2005 which was much prior to the institution of the suit. The suit was instituted on 13th September, 2005. In fact, as noted earlier one of the prayers in the suit is for a declaration that the agreement between the First and Third Defendants is not valid and would not bind the Plaintiff. A statement has also been made on affidavit that after the filing of the suit the property has been conveyed to the Third Defendant. Counsel appearing for the First and Second Defendants has placed on record a photocopy of the registered deed of conveyance between the First and Third Defendants. The compilation will show that the stamp duty of Rs.12.50 lacs was paid on 12th June, 2007 to the Collector of stamps. Thus, from a bare perusal of the averments contained in the plaint, it would be evident that it was the case of the Plaintiff himself that an agreement was entered into between the First and Third Defendants.

4. The statement which was made before the Court by the junior advocate will therefore be contrary to the position as it obtained even on the date of the institution of the suit. Prima facie, at this stage, it would emerge that even before the order dated 20th June, 2007 a deed of conveyance was entered into between the First and Third Defendants. The effect of the deed of conveyance which was entered into during the pendency of the Suit is a separate matter which would be duly considered when the Notice of Motion for interim relief is to be taken up. At this stage, particularly in the absence of any reply to the averments contained in paragraph 4 of the affidavit in support, there is merit in the submission that the junior advocate before the Court was not authorized to do so particularly when third party rights had already been created. The interest of justice would therefore warrant recalling of the order dated 20th June, 2007 and permission being granted for the withdrawal of the statement which appears to have been made by a junior advocate without instructions. The Notice of Motion is accordingly made absolute in terms of prayer clauses (a) and (b). As a consequence, Notice of Motion 3078 of 2005 shall now be placed before the Court for interim relief. However, it would be necessary to observe that the observations contained in

the present order shall not come in the way of the Court considering the application for interim relief and shall not amount to any expression of opinion by the Court on the merits of the rival contentions between the parties in the suit. The Notice of Motion is accordingly disposed of.